

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

CURTIS L. BEARD,

Petitioner,

v.

MARK NOOTH,

Respondent.

Case No. 2:12-cv-1470-PK

**ORDER ADOPTING FINDINGS AND
RECOMMENDATION**

Michael H. Simon, District Judge.

United States Magistrate Judge Paul Papak issued Findings and Recommendation in this case on June 28, 2013. Dkt.27. Judge Papak recommended that Petitioner's Writ of Habeas Corpus be denied and that a certificate of appealability should not be issued.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.

§ 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

Petitioner timely filed objections. Dkt.29. Petitioner objects to Judge Papak's findings that: (1) Petitioner's ignorance of the deadline for filing a petition under the AEDPA does not constitute extraordinary circumstance that would entitle Petitioner to equitable tolling, (2) Petitioner's efforts to pursue state post-conviction relief does not toll or extend the AEDPA statute of limitations, (3) Petitioner fails to meet his burden to prove equitable tolling; and (4) the recommendation that a certificate of appealability should be denied. The Court has reviewed *de novo* those portions of Judge Papak's Findings and Recommendation to which Petitioner has objected, as well as Petitioner's objections, the habeas petition and answer, and the briefs filed in support of and in opposition to the habeas petition. The Court agrees with Judge Papak's reasoning regarding the statute of limitations, equitable tolling, and the certificate of appealability and ADOPTS those portions of the Findings and Recommendation.

For those portions of a magistrate's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report[.]"); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (the court must review *de novo* magistrate's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Magistrates Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate's recommendations for "clear error on the face of the record."

For those portions of Judge Papak's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court **ADOPTS** Judge Papak's Findings and Recommendation, Dkt. 27. Petitioner's Petition for Writ of Habeas Corpus is DENIED and this proceeding is DISMISSED. The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 30th day of July, 2013.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge